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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT MANDIGO et al.,

Defendants and Appellants.

H043391

(Santa Clara County  
Super. Ct. No. B1580373)

Defendants Robert Mandigo and Delancy Huff appeal their convictions after a jury found them guilty of residential burglary, grand theft, unlawfully possessing a firearm, and participating in a criminal street gang, and found true allegations that they committed the offenses to benefit a gang. Both defendants contend the evidence is insufficient to support their convictions. Huff separately contends the trial court erred by admitting into evidence a bill of sale for property that was stolen in the burglary. We find no error and will affirm the judgments.

**I. BACKGROUND**

In the Bayview Hunter's Point neighborhood of San Francisco there is a street named Osceola. About a block long, it has no outlet because one end is blocked by concrete barriers. The residences are government subsidized housing units. The neighborhood is used as a "safety zone," or base of operations, by the Osceola gang. The gang has 15 to 25 members, who show their affiliation using a hand sign: an "O" shape formed by the thumb and forefinger with the other fingers extended.

Osceola has no formal structure; there is no one in charge and no one directs the actions of other members. Its primary activities are assaults, shootings, and automobile and residential burglaries. Members have been convicted of crimes for unlawfully possessing weapons and participating in a criminal street gang. Osceola maintains a violent, gun-fueled rivalry with other gangs in the area: they have shot and killed rival gang members and Osceola members have themselves been homicide victims. To display disrespect for other gangs, Osceola members post photos and videos to social media conveying threatening messages to their rivals.

In the opinion of Leonard Broberg (a San Francisco Police detective who has investigated Osceola gang activity since the 1990s), defendants Robert Mandigo and Delancy Huff are both Osceola gang members. On a July afternoon in 2015, Mandigo, Huff, and a young woman named Khalida Peterson drove to Los Altos in Huff's BMW. They parked on the street outside a house and waited for the residents to leave. A neighbor's security camera captured the residents' car pulling away and then the BMW backing into the driveway. When the residents returned after about an hour, they found the house had been broken into through an exterior glass door. Jewelry, watches, collectable coins, military service medals, and a locked chest containing five guns were stolen.

Later that afternoon, Mandigo, Huff, and Peterson arrived at a coin shop in San Francisco. Footage from security cameras shows them selling the stolen coins and jewelry, then dividing the money among them. Receipts and a bill of sale indicate defendants received \$2,350 for the coins and \$362 for the jewelry.

Los Altos police conducted a records check for the license plate of the BMW used in the burglary (the plate number is visible in the video from the neighbor's camera), which revealed Huff to be the car's owner. San Francisco police located and stopped the BMW that same day on the Osceola block. Khalida Peterson was driving, and the passengers were Mandigo, Huff, and another Osceola gang member. Huff had a watch

that was stolen in the burglary in his pocket. In Mandigo's pocket was a key to one of the housing units on Osceola. Police searched the unit and found one of the stolen guns that had previously been stored in the locked chest.

Mandigo and Huff were each charged with first degree burglary (Pen. Code, §§ 459, 460, subd. (a)); active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)); being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)); grand theft of a firearm (Pen. Code, §§ 484, 487, subd. (d)(2)); and grand theft (Pen. Code, §§ 484, 487). It was also alleged the offenses were committed in association with or for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)) and, in Huff's case, that he had served prior prison terms (Pen. Code, § 667.5, subd. (b)). Peterson was charged with first degree burglary and being a felon in possession of a firearm. She resolved her case with a no contest plea before trial. Mandigo and Huff were tried together and the jury returned guilty verdicts on all charges and found the special allegations true. The trial court sentenced Mandigo to 11 years in prison. Huff was sentenced to 15 years.

## **II. BACKGROUND**

### **A. SUFFICIENCY OF THE EVIDENCE**

Both defendants contend that certain of their convictions are not supported by the evidence. They also contend there is insufficient evidence to support the gang-related allegations. When reviewing the sufficiency of the evidence, we examine the entire record and view the facts as we have stated them above: in the light most favorable to the judgment. (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955.) We do not reweigh the evidence or resolve factual conflicts; we decide only whether the record contains credible evidence from which a rational jury could find the elements of the crime were established beyond a reasonable doubt. (*Ibid.*)

## **1. Evidence Supporting Huff's Burglary Conviction**

Burglary requires proof that the defendant entered a residence intending to commit theft or any felony. (CALCRIM Nos. 1700, 1701). To be guilty of burglary, Huff need not have committed the offense but merely assisted the perpetrator in doing so. (See CALCRIM No. 401 [defining aiding and abetting liability: a defendant is guilty of the target crime if he knew that the perpetrator intended to commit the crime, and the defendant intended to and did aid in the commission of the crime].)

The record contains ample evidence to support the conclusion that Huff at least aided and abetted the burglary. Cell phone records indicate he communicated with both Peterson and Mandigo in the hours leading up to the break in. There is video of his car being used to commit the crime. Footage from cameras at the coin store show Huff selling stolen items and receiving a share of the profits. And he had one of the stolen items in his pants pocket when he was arrested. Faced with that evidence, Huff's trial counsel elected to focus on the gang participation charge and the gang enhancements in closing argument. He told the jury: "I'm not going to insult your intelligence by talking about a burglary. I'm not going to insult your intelligence by talking about stealing property. I'm sure you've already figured that out."<sup>1</sup> The jury reasonably concluded that Huff either committed the burglary or assisted the perpetrator.

## **2. Evidence Supporting Huff's Firearm Conviction**

Penal Code section 29800, subdivision (a)(1) prohibits a felon from possessing, or having custody or control over, a firearm. Personal possession of a gun is not required—"the crime is committed the instant the felon in any way has a firearm within his control."

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<sup>1</sup> Counsel's decision to avoid the loss of credibility that likely would have resulted from arguing Huff was not involved in the burglary despite video evidence indicating otherwise was a sound tactical choice. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1060–1061 ["[G]ood trial tactics often demand complete candor with the jury, and [] in light of the weight of the evidence incriminating a defendant, an attorney may be more realistic and effective by avoiding sweeping declarations of his or her client's innocence."].)

(*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1410.) Knowledge is also an element of the offense. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.)

Huff's argument is that even if one assumes he participated in the burglary, he could not have *knowingly* possessed any of the stolen firearms because they were concealed in a locked chest and there is no evidence he was aware of its contents. That argument might succeed if the chest were not opened between the time it was stolen and when Huff was arrested. But it was: although the chest itself was never recovered, it had apparently been opened and at least one gun removed because police found the gun inside a drawer in an apartment unit on Osceola. Taken together, the evidence indicates that Huff participated in the burglary where a chest containing five guns was taken; he remained in the company of the other perpetrators until the time of his arrest; and in the interim the chest was opened and at least one gun removed and taken to an apartment. The jury could reasonably infer from that evidence that Huff knowingly had control over a firearm on the day in question. (See Evid. Code, § 600, subd. (a) [logical and reasonable deduction of fact from another fact or group of facts established in the action].)

### **3. Evidence Supporting Mandigo's Gang Participation Conviction**

Penal Code section 186.22, subdivision (a) prohibits promoting or assisting criminal conduct by gang members, with the knowledge that members have engaged in a pattern of criminal gang activity. "Pattern of criminal gang activity" is defined as committing or being convicted of two or more of the offenses found in subdivision (e) of that statute, which lists 33 felonies.

Mandigo argues that the prosecution did not meet its burden of showing that Osceola members committed two or more of the statutorily enumerated offenses. The prosecution introduced evidence of six felony convictions to prove the requisite pattern of criminal gang activity: two convictions for participating in a criminal street gang

(Pen. Code, § 186.22, subd. (a)); two convictions for possessing an assault weapon (Pen. Code, § 30605, subd. (a)); one conviction of a felon possessing a firearm (Pen. Code, § 29800, subd. (a)(1)); and one conviction for possessing a firearm in violation of a probation condition (Pen. Code, § 29815, subd. (a)). Mandigo points out—correctly—that the first four convictions (for participating in a criminal street gang and possessing an assault weapon) are not offenses listed in Penal Code section 186.22, subdivision (e). Accordingly, none of those four convictions can be used to satisfy the “pattern of criminal gang activity” element of the gang participation offense. But the record is still sufficient to support Mandigo’s conviction because the prosecution also introduced evidence of convictions for two offenses that *are* listed: possessing a firearm as a felon, and possessing a firearm in violation of a probation condition.<sup>2</sup> Further, as Mandigo concedes, three of the offenses he was charged with in this case (burglary, grand theft, and felon in possession of a firearm) are listed in the statute and qualify as evidence of a pattern of gang activity. (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1400 [charged crime can serve as a predicate offense].)

Mandigo asserts there is no way to be sure the jury relied on the two valid convictions as proof of the pattern of criminal activity element, as opposed to the any of the four invalid, non-listed convictions, since the jury returned a general verdict of guilty after the prosecutor argued in closing that all six of the convictions could be used to prove the element. On appeal though, we presume the judgment is correct and must

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<sup>2</sup> The existence of two valid predicate offenses means the evidence is clearly sufficient to support the judgment. What is not clear is whether the other four invalid predicate offenses were admissible evidence. Depending on the conduct underlying those convictions, they could have been relevant to show the *commission* of a listed offense, even if the *conviction* was ultimately for a non-listed offense. Since no one objected to the admission of the invalid predicates, the issue was not developed in the trial court and (probably for that reason) Mandigo does not attempt to raise the issue on appeal. Nor does either defendant contend he received ineffective assistance of counsel based on a failure to object. We therefore have no occasion to decide whether the four convictions for non-listed offenses were admitted in error.

indulge every inference to support it. (*People v. Albillar* (2010) 51 Cal.4th 47, 60 [“We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.”].) We therefore assume the jury relied only on the valid predicate offenses— notwithstanding the prosecutor’s legally incorrect argument that it could use all six convictions. The trial court directed the jury before closing arguments began to follow the court’s instructions even if “you believe that the attorneys’ comments on the law conflict with my instructions.” We presume the jury followed the court’s directions. (*People v. Welch* (1999) 20 Cal.4th 701, 773.)

With regard to the specific instruction on the elements of the gang participation charge, Mandigo argues the instruction wrongly told the jury it could consider the invalid, non-listed offenses in determining whether the prosecution had proven a pattern of gang activity. But the instruction accurately stated the law. The jury was instructed that, “A pattern of criminal gang activity as used here means, one, the commission of or attempted commission of or conspiracy to commit, or conviction of any combination of two or more of the following crimes, or two or more occurrences of one or more of the following crimes: [¶] Burglary. Assault by means of force likely to cause great bodily injury. Assault with a deadly weapon. Robbery. Grand theft. Carrying a concealed firearm. Prohibited person in possession of a firearm, or carrying a loaded firearm.” All of the offenses described in the instruction are listed in Penal Code section 186.22, subdivision (e). The instruction was therefore legally correct—in contrast to the erroneous instruction in a case discussed by the parties, *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1400 [jury was instructed that a pattern of criminal gang activity could be based on “ ‘battery with serious bodily injury,’ ” even though that offense is not listed in the statute]. The evidence presented at trial was adequate to support the “pattern

of criminal gang activity” element of the gang participation charge, notwithstanding the admission of the additional convictions.

#### **4. Gang Sentencing Enhancements**

Both defendants contend there was insufficient evidence for the jury to find true the allegation that they acted for the benefit of a criminal street gang. Penal Code section 186.22, subdivision (b)(1) provides a sentencing enhancement for any felony “committed for the benefit of, at the direction of, or in association with” a gang, when the crime is committed “with the specific intent to promote, further, or assist” in criminal conduct by gang members.

Huff first argues there is insufficient evidence to conclude he was a member of Osceola (Mandigo concedes his own membership status)—the relevant inference being it is unlikely Huff committed the crime to benefit a gang to which he does not belong. Of course, membership is not required for a conviction on the gang participation offense or for imposition of the gang enhancement, only active participation. (*People v. Villa-Gomez* (2017) 9 Cal.App.5th 527, 539–540.) Active participation can be shown by a defendant assisting a gang member in criminal conduct. (*People v. Archuleta* (2014) 225 Cal.App.4th 527, 563.) The jury found Huff committed a burglary with an Osceola member, and that alone is sufficient evidence of active participation. Further, the prosecution presented additional evidence indicating Huff is a member of Osceola: he was photographed together with Osceola members, he appeared in a video with members in which rival gangs are threatened with violence, and a detective qualified as a gang expert identified him as a member. Huff points out that his presence in photos and videos with gang members can be explained by the fact that they were taken in the Osceola neighborhood, which is where he lived, and that he has no tattoos or other physical indicia of gang membership. Nonetheless, the jury weighed the conflicting evidence and decided Huff was at least an active participant in the gang (finding him guilty on the gang



participation charge). Since there is evidence to support that conclusion we will not disturb it on appeal.

Both defendants assert there is nothing to show that the burglary or the related theft and firearm possession offenses were committed with the requisite specific intent to promote, further, or assist the gang. They assert the evidence shows crimes committed for the personal financial benefit of the perpetrators, and not for any purpose beyond that. They emphasize that the burglary occurred outside Osceola's territory and there was no evidence anyone boasted about the crime to enhance the reputation of the gang. Defendants' challenge to the sufficiency of the evidence ultimately fails, however, because they committed the crimes together. "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 (*Villalobos*)). Defendants argue that a non-gang member, Khalida Peterson, also committed the burglary; but her involvement does not change the fact that Huff and Mandigo acted in concert. And the gang expert explained that in his experience, female gang associates will occasionally assist gang members in committing gang crimes.

Defendants cite *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*) and *People v. Ochoa* (2009) 179 Cal.App.4th 650 (*Ochoa*), cases finding insufficient evidence for a gang enhancement. But both are distinguishable. In *Ochoa*, the defendant acted alone when he carjacked the victim, so there was no evidence he acted in concert with another gang member. (*Ochoa*, at p. 653.) Here, defendants were gang members (or at least active participants) who committed a crime together, a fact which itself supplies substantial evidence for the gang enhancement. (*Villalobos, supra*, 145 Cal.App.4th at p. 322.) *Ramon* involved stolen vehicle possession. The court emphasized that the gang expert did not identify possessing stolen vehicles as one of the primary activities of the gang, and that its "analysis might be different if the expert's

opinion had included ‘possessing stolen vehicles’ as one of the activities of the gang.” (*Ramon*, at p. 853.) Here, the gang expert identified residential burglary as one of the primary activities of the Osceola gang, and defendants were convicted of committing that crime.

The *Ramon* court found an expert’s opinion that a crime benefited the gang merely because it was committed by two gang members in gang territory to be insufficient to support a gang enhancement. But *Ramon* did not discuss *Villalobos* or *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198, which both held that gang members committing a crime in concert *is* sufficient to support the enhancement. And after *Ramon* was decided, the California Supreme Court confirmed in *People v. Albillar* (2010) 51 Cal.4th 47, 68, that “if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.”

#### **B. ADMISSIBILITY OF THE BILL OF SALE**

Huff contends the trial court erred by admitting a bill of sale from the coin shop where defendants sold stolen property. We review a decision to admit evidence for abuse of discretion. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 131.) The Attorney General argues that the bill of sale, although hearsay, was admissible under the Evidence Code section 1271 exception for business records, and we agree. That section makes a writing admissible when it is created in the regular course of business; near the time of the relevant event; a qualified witness authenticates it and describes how it was prepared; and the circumstances surrounding its preparation indicate its contents are trustworthy. “A trial judge is vested with wide discretion in determining whether a proper foundation has been laid for admission of business records under the business records exception. [Citation.] ‘Where the trial court has determined that the foundation laid was sufficient to support the introduction of evidence under the business records exception, and the

record reasonably supports this determination, its conclusion is binding on the appellate court.’ [Citation.]” (*People v. Zavala* (2013) 216 Cal.App.4th 242, 245–246.)

Here, the owner of the coin shop testified that the bill of sale was generated by a computer program used in the regular course of the store’s business and explained that the program generated the document based on information entered by a store employee. The record reasonably supports the trial court’s finding of an adequate foundation to apply the business records exception, so it was not an abuse of discretion to admit the bill of sale. And even if it were error to admit the document, it is unlikely to have affected the outcome of the trial. (See *People v. Benavides* (2005) 35 Cal.4th 69, 91 [evidentiary error is harmless unless it is reasonably probable jury would have reached a different conclusion absent the error].) In view of the other evidence connecting Huff to the stolen property (which included video of him at the coin shop selling it), the bill of sale was of little overall consequence.

### **III. DISPOSITION**

The judgments are affirmed.

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Grover, J.

**WE CONCUR:**

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Greenwood, P. J.

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Danner, J.